No. 277.

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OCTOBER TERM, 1899.

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LOUISA BANHOLZER,
Plaintiff in Error,

vs.

THE NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Counsel for Plaintiff in Error.

CHRISTOPHER DILLON O'BRIEN,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

(17,386)

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I.

STATEMENT.

On September 16th, 1895, William Banholzer, the husband of plaintiff in error, took out a policy of

insurance upon his life in the New York Life Insurance Company, the defendant in error. The policy was of the kind known as a twenty year endowment, whereby the company agreed to pay $20,000 to the insured or assigns on the 16th day of September, 1915, if the insured should then be living, or in the event of his prior death, to pay that sum to his wife, Louisa Banholzer, the plaintiff in error, or in the event of her prior death, to the insured's executors, administrators or assigns, at the home office of the company in the City of New York, immediately upon receipt and approval of proofs of the death of the insured.

The contract was made in consideration of the written application for the policy, and further consideration of the sum of $1146 to be paid in advance, and of the payment of a like sum on the 16th day of September in every year thereafter during the continuance of the policy until twenty full years premium should have been paid. The first premium of $1146 was duly paid.

We take the liberty, for the sake of logical arrangement, of setting out at this point, instead of under Division III of this brief, that portion of the statute of the State of New York which we deem necessary to the decision of the case. That statute is likewise set out in the original complaint of the plaintiff and is found in the printed record in this court on page 3. The statute is New York Session Laws of 1892, chapter 690, section 92, and reads as follows:

"Section 92. No forfeiture of policy with-

"out notice. No life insurance corporation do-
"ing business in this State shall declare for-
"feited, or lapsed, any policy hereafter issued
"or renewed, and not issued upon the payment
"of monthly or weekly premiums, or unless the
"same is a term insurance contract for one year
"or less, nor shall any such policy be forfeited,
"or lapsed, by reason of non-payment when
"due of any premium, interest or installment
"or of any portion thereof required by the
"terms of the policy to be paid, unless a writ-
"ten or printed notice stating the amount of
"such premium, interest or installment or por-
"tion thereof due on such policy, the place
"where it should be paid, and the person to
"whom the same is payable, shall be duly ad-
"dressed and mailed to the person whose life is
"insured, or assignee of the policy, if notice of
"the assignment has been given to the corpora-
"tion, at his or her last known post-office ad-
"dress, postage paid by the corporation, or by
"an officer thereof or person appointed by it to
"collect such premium, at least fifteen and not
"more than forty-five days prior to the day
"when the same is payable.

"The notice shall also state that unless such
"premium, interest or installment, or portion
"thereof, then due, shall be paid to the corpor-
"ation, or to a duly appointed agent or person
"authorized to collect such premium by or be-
"fore the day it falls due, the policy and all pay-
"ments thereon shall become forfeited and
"void except as to the rights to a surrender-
"value or paid-up policy as in this chapter pro-
"vided.

"If the payment demanded by such notice
"shall be made within the time limited there-
"for, it shall be taken to be in full compliance
"with the requirements of the policy in respect
"to the time of such payment; and no such pol-
"icy shall in any case be forfeited or declared
"forfeited, or lapsed, until the expiration of
"thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent "of the corporation, or of any one authorized to "mail such notice, that the notice required by "this section, has been duly addressed and "mailed by the corporation issuing such policy "shall be presumptive evidence that such no- "tice has been duly given."

It was admitted on behalf of plaintiff in the court below that within the required time prior to September 16th, 1896, the due date of the second premium, the defendant company duly gave to the insured the notice required by this statute. (See printed record, folio 66).

On the 6th of October, 1896, the insured paid the defendant company $286.00 in cash and gave his note at six months for $860.00. This note read as follows:

"Pol. 692,465. St. Paul, Minn., 9-16-1896. "Without grace six months after date I prom- "ise to pay to the order of the New York Life "Insurance Company eight hundred and sixty "dollars at Second National Bank, St. Paul, "Minn., value received with interest at the rate "of 5 per cent per annum. This note is given "in part payment of the premium due 9-16-'96, "on the above policy with the understanding "that all claims to further insurance and all "benefits whatever which full payment in cash "of said premium would have secured shall be- "come immediately void and be forfeited to the "New York Life Insurance Company, if this "note is not paid at maturity, except as other- "wise provided in the policy itself.

"No. 43,205. Int. 21.50 $860.

"M'ch. 16, '97.

William Banholzer."

At the same time insured received the following renewal receipt:

"New York Life Insurance Company, 346-
"348 Broadway, New York. Cash $286.
"St. Paul, Minn., 10-6-'96.
"Note. 6 mo. dated 9-16-'96, due 3-16-'97,
"without grace. Made by William Banholzer.
"Payable at Second National Bank ,St. Paul,
"Minn. Received from the owner of policy
"No. 692,465, $286 in cash and his note at six
"months for $860 which continues said policy
"in force until the 16th day of Sept., 1897, at
"noon, in accordance with its terms and condi
"tions, provided the above note is paid at ma-
"turity, and this receipt signed by
"J. A. Campbell, Cashier."

The foregoing note and renewal receipt will be found in printed record on page 39.

On March 16, 1897, the due date of the above note, the insured paid the defendant company on account of his premium originally due Sept. 16, 1896, the further sum of $241.50 and gave the company his note at sixty days for the balance, $639, which was as follows:

"Pol. 692,465. St. Paul, Minn., 3-16-1897.
"Without grace two months after date I prom-
"ise to pay to the order of the New York Life
"Insurance Company, six hundred and thirty-
"nine dollars, at Second National Bank, St.
"Paul, Minn., value received, with interest at
"the rate of 5 per cent per annum.
"This note is given in part payment of the
"premium due 3-16-'96, on the above policy,
"with the understanding that all claims to
"further insurance, and all benefits whatever,
"which full payment in cash of said premium
"would have secured, shall become immediate-
"ly void and be forfeited to the New York Life
"Insurance Company if this note is not paid

"at maturity, except as otherwise provided in
"the policy itself.
"$639.00 (Signed)
"William Banholzer."
(See printed record, page 16.)

Upon receiving this note defendant surrendered to the insured his former note for $860.00. The second note was not paid at maturity, but shortly afterwards the full amount due was tendered the defendant who declined to accept it.

The insured died at the City of St. Paul, Minn., on the 5th day of July, 1897. On the 14th day of December, 1897, plaintiff duly served on the defendant at its home office in New York affidavits in proof of the death of the insured which were retained by defendant. (See printed record folio 39). As the company refused to pay, this action was commenced in January, 1898, in the District Court of Ramsey County, Minnesota.

It was admitted on the part of defendant, (see printed record, folio 66) that no notice, such as is required by the statute above set out, was given the insured by defendant within the required period prior to the maturity of either the insured's note dated September 16, 1896, or the one dated March 16th, 1897.

The plaintiff claimed in her complaint and has ever since contended that the statute in question required on the part of the defendant company the giving of the notice in the statute prescribed within the time therein indicated prior to the maturity of the insured's notes dated respectively 9-16-1896, and 3-16-1897, before a forfeiture of the policy could

be declared by reason of their non-payment; that the provisions of the statute are mandatory and cannot be waived; that the defendant having failed to give such notice could not declare the policy forfeited or lapsed by reason of the non-payment of these notes, or either of them, at their maturity. She claimed that a contrary interpretation of the statute would be denying to it that "full faith and credit" secured in every state to the public acts of every other state by virtue of section 1 of article IV of the constitution of the United States. (See printed record, folio 12.) While originally other questions were raised by the plaintiff they were determined adversely to her and her case made to stand or fall solely upon the interpretation of the New York statute, and the question now before this court is, did the court below in the case at bar *give to the statute such full faith and credit as is secured to it by the constitution of the United States.* This question may be said to permeate the entire case, sometimes expressly and sometimes by necessary implication. It is raised in the complaint, where the statute, is set forth in terms; it was the vital question in the mind of the District Court in the trial of the case (printed record, folios 67 to 70); in the Supreme Court on appeal from the order of the District Court refusing a new trial, it was the leading, and on reargument the sole issue; on appeal from the judgment of District Court this was the only question presented to the Supreme Court of Minnesota (printed record, folios 12 to 14).

II.

ERRORS ASSIGNED.

Plaintiff in error has assigned and relies upon the following errors which are manifest in the record and proceeding of the lower court in this case, namely:

1. Whereas, in her complaint she set out the public act of the State of New York, being session laws of 1892, chapter 690, section 92, which is set forth in the foregoing statement of plaintiff in error; and said public act was admitted by the defendant in error to be genuine; and whereas, the plaintiff in error in the lower court did specially set up and claim that, by virtue of the force and effect secured to the said public act in the State of Minnesota by section 1 of article IV of the constitution and section 905, Revised Statutes, of the United States, under the facts disclosed by the record, no forfeiture of the life insurance policy upon which a recovery was sought in this action had or could have occurred or could be declared, and did specially set up and claim under said sections of the constitution and statutes of the United States an exemption and immunity from any forfeiture of said policy; the court below erred in deciding against the exemption and immunity aforesaid specially set up and claimed by plaintiff in error, for the reason that it thereby did not give to said public act of the State of New York, the full faith and credit secured thereto by the said sections of the constitution and statutes of the United States.

2. For the same reason and in like manner the court erred in holding that the provisions of said public act did not apply to that portion of the premium due March 16th, 1897, upon said policy, for which portion thereof the insured in said policy gave his promissory note dated 9-16-'96.

3. For the same reason and in like manner the court erred in determining that the provisions of said public act did not apply to that portion of the premium due May 16, 1897, upon said policy for which portion thereof said insured gave his promissory note dated 3-16-'97.

4. For the same reason and in like manner the court erred in holding, that having prior to the time the annual premium became payable in September, 1896, given the notice required by the said public act, defendant was not required to give any other notice.

5. For the same reason and in like manner the court erred in deciding that upon the failure of said insured to pay his said note dated 3-16-'97, at its maturity his policy lapsed and became forfeited, defendant in error having admitted its failure to give the notice required by said public act within the requisite period prior thereto.

6. For the same reason and in like manner, on account of the errors above specified having also occurred in the proceedings in said action in the District Court of Ramsey County, Minnesota, whence it was carried by appeal from an order de-

nying plaintiff's motion for a new trial to the Supreme Court of that state, the latter erred in not reversing the said order and granting the plaintiff a new trial.

7. For the same reason and in like manner, on account of the errors above specified having also occurred in the proceedings and judgment in said action in said District Court from which judgment plaintiff in error appealed to said Supreme Court of the State of Minnesota, the latter erred in not reversing such judgment and in not directing a new trial of said action.

8. For the same reason and in like manner the court below erred in rendering judgment for the defendant in error, whereas by the law of the land, such judgment ought to have been given plaintiff and against defendant in error.

9. The court below erred in so far as it holds that the New York Court of Appeals in the case of Conway v. Insurance Company, 140 New York 79, intended to decide the question of the applicability of said provisions of said public act relative to notice to a portion of a premium for which the insured gave his promissory note, under such circumstances and conditions as existed in the case at bar.

III.

POINTS OF LAW AND FACT.

Assignments one to eight inclusive rest on construction of the provisions of section 92, of chapter 690 of the New York Session Laws of 1892, as *res integra*. Counsel for defendant in error have claimed that the matter is not *res integra* that it has been passed upon by the Court of Appeals of New York in the case of Conway v. Insurance Company, 140 N. Y. 79, which forecloses all other courts upon the question. This I dispute, as is seen in plaintiff's ninth assignment of error, which will be discussed first.

A. The ninth assignment of error is as follows:

> "That court below erred in so far as it holds "that the New York Court of Appeals in the "case of Conway v. Insurance Company, 140 N. "Y. 79, intended to decide the question of the "applicability of said provisions of said public "act relative to notice to a portion of a pre- "mium for which the insured gave his promis- "sory note, under such circumstances and con- "ditions as existed in the case at bar."

1. Even if the Court in the Conway case had intended to decide that question, the decision would not be an authority binding upon this or any court upon the same question in this case, because the statute referred to in the Conway case was chapter 321, Laws of 1877, which is different and not nearly so comprehensive as section 92, chapter 690, laws of 1892, to which plaintiff claims the lower court failed to give full faith and credit.

The law of 1877 read as follows:

"Section 1. No life insurance company do-
"ing business in the state of New York shall
"have power to declare forfeited or lapsed any
"policy hereafter issued or renewed by reason
"of non-payment of any annual premium or
"interest, or any portion thereof, except as
"hereinafter provided. Whenever any pre-
"mium or interest due upon any such policy
"shall remain unpaid when due, a written or
"printed notice stating the amount of such
"premium or interest due on such policy, the
"place where said premium or interest should
"be paid, and the person to whom the same
"is payable, shall be duly addressed and mail-
"ed to the person whose life is assured, or the
"assignee of the policy, if notice of the assign-
"ment has been given to the company, at his
"or her last known post-office address, postage
"paid by the company, or by an agent of such
"company, or person appointed by it to collect
"such premium. Such notice shall further
'state that unless the said premium or interest
"then due shall be paid to the company or to a
"duly appointed agent or other person author-
"ized to collect such premium within thirty
"days after the mailing of such notice, the said
"policy and all payments thereon will become
"forfeited and void. In case the payment de-
"manded by such notice shall be made within
"the thirty days limited therefor, the same
"shall be taken to be in full compliance with
"the requirements of the policy in respect to
"the payment of said premium or interest, any-
"thing therein contained to the contrary not-
"withstanding; but no such policy shall in any
"case be forfeited or declared forfeited or
"lapsed until the expiration of thirty days after
"the mailing of such notice. Provided, how-
"ever, that a notice stating when the premium
"will fall due and that if not paid the policy
"and all payments thereon will become forfeit-

"ed and void, served in the manner hereinbe-
"fore provided, at least thirty and not more
"than sixty days prior to the day when the
"premium is payable, shall have the same ef-
"fect as the service of the notice hereinbefore
"provided for."

The law of 1892 is set out in terms in our statement, part I of this brief. We do not admit that the Conway case was a decision of the question under the law of 1877, but we do admit that that law was susceptible of the construction which counsel for defendant in error say they find placed upon it in the Conway case. The law of 1892, on the other hand, we claim is not at all susceptible of such a construction. The two laws are easily distinguishable when the important parts are contrasted, and the greater comprehensiveness of the law of 1892 is in like manner apparent.

1892.	1877.
Nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest of instalment or of any portion thereof required by the terms of the policy to be paid, unless, &c.	No life insurance company shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of any annual premium of interest, or any portion thereof, except, &c.

The former law is susceptible of being limited in its application to premiums or portions of premiums due at annual or regular and equidistant periods, because in the former law the words "premium or interest or any portion thereof" are qualified and restricted by the word "annual." The latter law is

not susceptible of such limitation because in the latter law those words are not qualified or restricted by the word "annual" (which is entirely omitted); and because too in addition to this relief from restriction, the operation and force of those words ("premium or interest or any portion thereof") are enlarged and magnified by the introduction of the phrase "when due" and the word "installment," which are not found in the earlier law. Thus is the later law seen not only to be the more comprehensive, but also essentially different from the earlier one in particulars of vital importance to this plaintiff's interests.

The law of 1892 expressly repealed that of 1877.

Rosenplanter v. Society, 96 Fed. R. 721, 725.

2. But the Conway case was not a decision of the question now before the court, even under the law of 1877, i. e., the question of the applicability of the provision relative to notice to premiums, interest, or instalments or portions of premiums, represented by the promissory notes of insured persons.

That case does not control the decision of this court in the construction of the statute, unless the case would be a binding precedent upon the New York Court itself under the common law maxim *stare decisis*.

Carroll v. Carroll, 16 Howard 275, 286.

In that case this court say:

> "If the Court of Appeals had found it neces-
> "sary to construe a statute of that state in or-
> "der to decide upon the rights of parties sub-

"ject to its judicial control, such a decision, "deliberately made, might have been taken by "this court as a basis on which to rest our judg- "ment. But it must be remembered that we "are bound to decide a question of local law, "upon which the rights of parties depend, as "well as every other question, as we find it "ought to be decided. In making the exami- "nation preparatory to this finding, this Court "has followed two rules, one of which belongs "to the common law, and the other is a part "of our peculiar judicial system. The first is "the maxim of the common law *stare decisis*. "The second grows out of the thirty-fourth sec- "tion of the Judiciary Act (1 Stat. at L. 92,) "which makes the laws of the several states "the rules of decision in trials at the common "law; and inasmuch as the states have com- "mitted to their respective judiciaries the pow- "er to construe and fix the meaning of the stat- "utes passed by their legislature, this Court "has taken such constructions as part of the "law of the state, and has administered the "law as thus construed. But this rule has "grown up and been held with constant refer- "ence to the other rule, *stare decisis;* and it is "only so far and in such cases as this latter "rule can operate, that the other has any ef- "fect."

In order that a decision may constitute a precedent binding upon the Court under the doctrine stare decisis, it must possess the following characteristics:

a. It must have been made within and upon the issues actually before the court for judicial determination;

b. It must have been necessary to the determination of those issues;

c. It must have been needful to the ascertainment of the right or title in question between the parties;

d. It must have been a matter in judgment.

e. It must have been investigated with care, and made deliberately and upon solemn argument.

f. There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.

Carroll v. Carroll supra.

Grimes v. Byrne, 2 Minn. 89-102.

White v. Scott, 4 Barb. 56-59.

Judson v. Gray, 11 N. Y. 407-412.

People v. Mayor, 9 Barb. 544.

Harris v. Clark, 2 Barb. 94-101, 102.

Wells on Res Adj. & Stare Dec. p. 530 fol.

In Carroll v. Carroll, the Court say:

"If the Court of Appeals had found it nec-
"essary to construe a statute of that state in
"order to decide upon the rights of parties sub-
"ject to its judicial control, such a decision, de-
"liberately made, might have been taken by
"this court as a basis on which to rest our
"judgment."

"If the construction put by the court of a
"state upon one of its statutes was not a mat-
"ter in judgment, if it might have been decided
"either way without affecting any right
"brough into question, then, according to the
"principles of the common law, an opinion on
"such a question is not a decision. To make it
"so, there must have been an application of the
"judicial mind to the precise question neces-
"sary to be determined to fix the rights of the

"parties and decide to whom the property in "contestation belongs. And therefore this "Court and other courts organized under the "common law, has never held itself bound by "any part of an opinion, in any case, which was "not needful to the ascertainment of the right "or title in question between the parties. In "Cohen v. State of Virginia, 6 Wheat. 399, "this Court was much pressed with some por- "tion of its opinion in the case of Marbury v. "Madison. And Mr. Chief Justice Marshall "said: 'It is a maxim not to be disregarded "'that general expressions in every opinion "'are to be taken in connection with the case "'in which those expressions are used. If they "'go beyond the case, they may be respected, "'but ought not to control the judgment in a "'subsequent suit, when the very point is pre- "'sented. The reason of this maxim is ob- "'vious. The question actually before the "'court is investigated with care, and consid- "'ered in its full extent; other principles "'which may serve to illustrate it are consid- "'ered in their relation to the case decided, but "'their possible bearing on all other cases is "'seldom completely investigated.'"

Supreme Court of Minnesota in Grimes v. Bryne:

"A certain exercise of discretion must enter "into every examination of this nature, and no "adjudicated case can be authority for another "without the facts are identical in both. 'The "'positive authority of a decision is co-exten- "'sive only with the facts upon which it is "'made.' Marshall, C. J., 12 Wheat. 333."

The Court in People v. Mayor:

"We look into these opinions in vain for the "evidence of that solemn argument and ma- "ture deliberation, which upon the doctrine of "'*stare decisis*, should give to this case the "weight of authority sufficient to foreclose the

"judgment of all other tribunals upon the same "question."

In the case of Harris v. Clark, the Court say:

"In opposition to this doctrine, however, the "case of Wright v. Wright is pressed upon us "as an authoritive adjudication, which we are "bound to follow. We believe in a rigid adher- "ence to the doctrine of *stare decisis*. We re "gard it as necessary to preserve the certain- "ty, the stability, and the symmetry of any "system of jurisprudence; and therefore, if we "had any reason to believe that the decision in "this case was made upon deliberate consider- "ation, and that the adoption of the reasons as- "signed by the judge, was necessary to the de- "cision of the questions before the court, we "should certainly regard it as an authority "binding upon us, and leave the error, if any "there were, to be corrected in the court of "the last resort. But we do not think the case "of Wright v. Wright entitled to the author- "ity of a judgment upon the point in question. "* * * The decision might well have been "placed upon the ground assumed by the cir- "cuit judge, in refusing to grant the same or- "der, which in no respect involved the princi- "ple now under consideration. It is manifest "from the report of that case, that it did not "receive a deliberate examination either by "the counsel or the court. * * * For these "reasons we consider ourselves at liberty to "dispose of this interesting and important "question, unembarrassed by the authority of "the decision in Wright v. Wright."

Upon the question of the applicability of the provisions of the statute relating to notice to premiums, or instalments or portions of premiums, for which an insured has given his note, the Conway case possesses none of these essential characteris-

tics of a valid precedent under the doctrine *stare decisis*. The facts of the Conway case were these. Oct. 24th, 1891, the fifth annual premium came due upon a policy substantially like the Banholzer policy. Conway failed to pay it, but gave to the general agents of the Company his note in the following words and figures:

"$202.35 Troy, Oct. 24th, 1891.

"Six months after date, I promise to pay to "the order of M. V. B. Bull & Co., two hundred "35-100 dollars, at Manufacturers Nat. Bank, "with interest, value received.

"W. C. Conway."

(See printed record, page 61.)

M. V. B. Bull & Co., the general agents took this note, but withheld the renewal receipt, to which insured was entitled on paying his premium. The policy contained provisions

"That no agent or other person can alter, "modify or waive any of the terms or condi- "tions of this policy," and "that if any subse- "quent premium hereon be not paid when due, "and a separate receipt signed by the president "or secretary of this company in each case giv- "en therefor, then this policy shall cease."

Conway v. Insurance Co., 140 N. Y. 80.

A clause equally restrictive upon an agent's power to waive or postpone payment of premiums, or to accept them after due date, was contained in each renewal receipt. A few days before the maturity of this note Conway wrote to the agents asking its renewal for a period of time, to which they wrote him in reply:

"Your renewal has remained unpaid since

"October last, pending the maturity of your "note, and we do not feel at liberty to accept "a note extending the time any further. We "will, if you so request, recall your note from "the bank * * * and hold your renewal "at this office as long as it may be possible to "do so. You will understand that we are like-"ly any day to be required to return it to the "home office for cancellation."

Conway v. Insurance Co., 140 N. Y. 81.

The note was not paid at maturity and a few days afterward the assured died.

In the complaint there was an allegation (printed record part of folio 119) that defendant failed to give the statutory notice respecting the premium due by the terms of the note, but it was wholly immaterial to the issues and decision of the case whether defendant gave it or did not give it. The trial court, in disposing of the case, never mentioned the matter at all, (printed record, pp. 79 and 80), which indicates that it was not urged before nor considered material by that court. Counsel for appellant, the company, in their long and exhaustive brief in the appellate court make no reference whatever to the question of the applicability of the provisions of the statute relating to notice to the "premium due by the terms of the note," which indicates that they were unaware of the presence of such a question in the case. They discuss the statute with reference solely to an annual premium (printed record, pp. 98 and 99.) Finally counsel for respondent makes only a cursory reference to the question in his brief in the Appellate Court; he devotes eight of the four hundred

and twenty-five lines of his brief to it, and no more, (printed record, folio 206); which indicates that he couldn't have thought the question of any importance in the case. The truth is that the only material question in the case was whether the note of Conway to the general agents of the company was binding upon the company itself as a payment of the premium due Oct. 24th, 1891, from Conway; in other words whether the company had, by the action of its agents duly authorized in that regard, waived cash payment of that premium, and thereby lost the right to declare the policy lapsed for non-payment of the premium. The lower or trial court decided this question in the affirmative, the higher court in the negative, and upon that decision alone each respectively founded its judgment of the case. Whether we take the affirmative or the negative view of that question, the matter of the applicability of the statute to premiums, or an instalment or portion of a premium, for which a note has been given, is in no way at all involved. For if we take the affirmative, and hold that the company was bound by the action of its agents and that it did waive cash payment of the premium, then we find that the company could not have declared the policy forfeited and lapsed for non-payment of the note at maturity even if it gave the statutory notice within the prescribed time prior thereto of its intention to do so, *because there was no provisions either in the note or in the policy, which would permit them to do it.* On the other hand if we take the negative view of the question,

as the appellate court did, we find, just as they did, that Conway's policy ceased Oct. 24th, 1891, or when he failed to pay his premium then due within the period of grace allowed, and was never afterward revived or reinstated. Then of course there was no occasion for giving any more statutory notices. That the question we have indicated was the sole material question in the Conway case is gleaned from reading the report of it. The following excerpts from the opinion:

> "But in dealing with agents, whose powers "were limited, the insured was bound by the "limitations, * * * It was, therefore, "fairly inferable that the agents of the defend- "ant were at liberty, *not to make any new "agreement as to the time for the payment by "the insured of his premium*, but to accept "payment of it and thus waive the right to de- "clare a forfeiture; provided, that at the time "the conditions had not been changed by an "alteration in the health of the insured. While "the contract of insurance was in force, and up "to the time when the insured had the right "to renew it by payment of the premium in ad- "vance, the risk in the matter was on the com- "pany; but upon failure to pay, after notice, "upon the due date of the premium, the risk "was on the insured that, pending the delay "permitted by the agents, he might change in "health, if not die, and his insurance be lost."
>
> "When it became obligatory upon him, in or- "der to be entitled to a renewal of the insur- "ance agreement, to pay his premium, he knew "*that no agent had authority to make any "new or other agreement affecting the terms "of the existing policy.* If he failed to make "payment and elected to rely upon some cus- "tom which might operate to save the policy "from forfeiture, what was the situation? Only

"this, that as there had become engrafted upon "the authority of the agents, by force of the "company's sanction, a power to accept pay- "ment of past-due premiums in those cases "where the physical conditions of the assured "were unchanged, they might subsequently be "willing and able to deliver to him a renewal "receipt upon his payment of the past-due pre- "mium. Assuming his knowledge of the ex- "istence of such a custom in the office, it was "not a fact which so far changed the situation "as to have entitled him to rest upon it with "the same security as upon a new agreement "with respect to the time of payment, validly "made and enforceable against the company. "He simply *threw himself upon the chances of* "*life* and of the exercise by the agents of a con- ditional authority to act."

Upon the question whether the company waived cash payment of the premium October 24th, 1891, by reason of the conduct of its agents in taking a note for it payable to them, the opinion of the Court of Appeals in the Conway case possesses the characteristics of valid precedent under the doctrine stare decisis; but upon no other question does it possess them, since that was the only question in the case. The question of the applicability of the statute relating to notice to a premium, or instalment or portion of a premium, for which the insured had given his note was (a) not within the issues before the Court; (b) its determination was not necessary to the determination of the issues in the case; (c) its determination was not needful to the ascertainment of the rights or title in question between the parties; (d) was not a matter in judgment; (e) was not investigated with care, nor de-

cided with deliberation, nor after solemn argument; (f) there was no application of the judicial mind to it as the precise question necessary to be determined to fix the rights of the parties.

When therefore the Court proceeds to use the following language in the Conway case:

> "No further notice was required from the "company to the deceased. The notice pro- "vided to be given by the statute as a condi- "tion of its right to declare a policy lapsed for "non-payment of an annual premium was not "necessary, inasmuch as it had duly given the "notice before the premium became due, which "the statute has provided for. The statute "does not apply to this case. (Chap. 341, Laws "1876, and Chap. 321, Laws 1877.)"

We have to take that language with reference to the facts of that case. So taken it is apparent that the Court was correct, and it is equally apparent that the Court had not in mind and did not intend that language to apply to a state of facts such as is presented to this Court in the case at bar, where as will appear, by a valid contract made by Mr. Banholzer directly with the company itself, and binding upon the company, the time for payment of an instalment or portion of his premium due September 16th, 1896, was extended to May 16th, 1897.

B. If our understanding of the language of the New York statute is right, this court must agree with us that the lower court erred in those respects specified in Plaintiff's Assignments of error numbered one to eight.

THE PROVISIONS OF THE NEW YORK STATUTE RELATING TO NOTICE ARE CLEAR AND UNAMBIGUOUS AND ACCORDINGLY ARE TO BE TAKEN AND UNDERSTOOD IN THEIR ORDINARY, PLAIN AND POPULAR SENSE; THAT SO TAKEN AND UNDERSTOOD THEY OBLIGED THE DEFENDANT IN ERROR TO GIVE THE NOTICE THEREIN PRSCRIBED WITHIN THE TIME THEREIN DESIGNATED PRIOR TO THE MATURITY OF THE NOTE OF THE INSURED DATED 3-16-97 BEFORE A FORFEITURE OF THE POLICY COULD BE DECLARED FOR FAILURE TO PAY THE NOTE.

Mr. Banholzer's annual premium was due Sept. 16, 1896, and payable within thirty days of grace thereafter according to the terms of the policy. The policy continued in force during this period of grace, October 6th, 1896, (see statement supra) the company accepted from him $286 cash and his note for the balance of the premium due, and gave him a renewal receipt. The note bore interest at 5 per cent, was due March 16th, 1897, and contained a provision for forfeiture of the policy in case of its non-payment at maturity, March 16th, 1897, the Company accepted a further instalment of $241.50 cash on the premium, from Mr. Banholzer, and his note for the balance, $639, due May 16th, 1897. This note contained the same provision for forfeiture of the policy as the first note.

The only natural and reasonable, and likewise

the only practical and common sense view of these transactions is this: October 6th, 1896, while the contract of insurance was still in force, the parties to it saw fit to alter and modify its original terms, by an agreement founded on a valuable consideration and binding upon them, to the extent of extending the time of payment of an "instalment or portion" of the premium from Sept. 16th, 1896, to March 16th, 1897. By the modified contract there was due on March 16th, 1897, an instalment or portion of a premium. On that date the parties saw fit again to modify their contract by extending the time of payment of a smaller instalment or portion of the premium from that date to May 16th, 1897; so that on the latter date there came due "interest" and an "instalment" or "portion" of a premium "required by the terms of the policy to be paid."

For non-payment of such interest and instalment or portion of a premium, the company could not declare the policy forfeited and lapsed unless it gave the insured notice as required by the statute of its intention to do so. The clear and unambiguous terms of the statute taken and understood in their plain, ordinary and popular sense require this; and they are mandatory and not subject to be set aside either by the company or by the insured, or by both together.

Society v. Clements, 140 U. S. 226-233;
Society v. Nixon, 81 Fed. R. 796;
Society v. Trimble, 83 Fed.R. 85;
Mutual Life Co. v. Hill, 97 Fed. R. 263;
Rowe v. Ins. Co., 38 N. Y. Supl. 621-625.

The Court of Appeals of New York has determined that if, subsequently to the execution of a contract of insurance, it be modified by the parties to the extent of making the premium payable in quarter-annual instead of annual instalments, the statute of 1877 relative to notice would apply to the quarterly instalments.

DeFrece v. Ins. Co., 136 N. Y. 144-149, 150.

That is exactly in accord with our understanding of the provisions of the statute.

Our view given above, that the time of payment of a portion or instalment of the premium was extended from Sept. 16th, 1896, to May 16th, 1897, is the same as that of the Court of Appeals of New York expressed in a case almost identical with this in point of fact.

Holly v. Met. L. Ins. Co., 105 N. Y. 437-443, 444.

We quote from the opinion, underscoring those expressions which indicate the truth of the foregoing assertion:

> "The written receipt is to be read in connec-
> "tion with this note, and the whole transaction
> "then appears to be and it was simply this:
> "The company acknowledged the receipt of the
> "February premium and continued the policy
> "in force to August sixteenth, provided the
> "note, which was given in place of cash pay-
> "ment of the premium, was paid at maturity.
> " * * * By failing to pay this last note
> "when due, the forfeiture provided therein
> "immediately attached and the plaintiff there-
> "by lost the right which he otherwise would
> "have had to further insurance, according to
> "the tenor of his policy, but which he agreed

"to give up on condition of obtaining an ex-
"*tension of the time in which to pay his pre-*
"*mium*, and by failing to pay it at the end of
"that time. * * * *The note not only ex-*
"*tended the time of payment of the premiums*,
"but * * * Here the plaintiff failed to
"pay his premium on the sixteenth of Febru-
"ary, and was accorded the favor of a post-
"ponement until the maturity of the first note
"in June, and then again until the maturity of
"the second in August * * *."

Our view is so much the natural and reasonable one to take, that Counsel for Defendant in error has repeatedly, in discussing the matter, fallen, unconsciously perhaps, into the use of such phrases and expressions as, "to extend the time," extension upon terms," "secure a further extension of time," "extension of time for payment of a premium," "extended the time of payment of premiums," modification of the original contract of insurance," "carry the insurance for the extended time;" expressions which we extract from his brief in the lower Court.

The company took the same view at the time, according to its letter. See printed Record, folios 80, 81.

The lower Court frequently refers to the transactions as extensions of time for payment of premium. See its opinions, printed record, folios 101, 102, 103.

II.

EVEN IF THE PROVISIONS OF THE STATUTE COULD BE CONSIDERED AT ALL AMBIGUOUS IN THIS REGARD, STILL IT CANNOT BE DENIED THAT IT IS FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION WE PLACE UPON IT,SO THAT A REASONABLY INTELLIGENT MAN ON READING THE STATUTE MIGHT HONESTLY PLACE THAT CONSTRUCTION UPON IT, THEN THAT CONSTRUCTION SHOULD PREVAIL, BECAUSE THE STATUTE OUGHT TO BE CONSTRUED MOST FAVORABLY TOWARD THE INSURED.

Ins. Co. v. Coos County, 151 U. S. 462, 463.
De Frece v. Ins. Co., 136 N. Y. 144.
Baxter v. Ins. Co., 119 N. Y. 450.
McDougall v. Society, 135 N. Y. 551.
Phelan v. Ins. Co., 113 N. Y. 147.
Carter v. Ins. Co., 110 N. Y. 15.
Society v. Nixon, 31 Fed. R. 800.

In the last case cited, the Court says:

"It has been several times decided by the "Court of Appeals of New York that the pro- "visions of this statute respecting forfeiture "should be strictly interpreted in favor of the "assured, and that the defense of a forfeiture "through non-payment of premium is not avail- "able to an insurance company if there has "been any departure on its part from the pro- "visions of the statute in regard to notice."

And as to contracts of insurance generally, this Court stated in 1894 in the Coos County case:

> "well settled that contracts of insurance, "like other contracts, are to be construed ac- "cording to the sense and meaning of the terms "which the parties have used, and if they are "clear and unambiguous, their terms are to "be taken and understood in their plain, or- "dinary, and popular sense." "when an insur- "ance contract is so drawn as to be ambiguous, "or to require interpretation, or to be fairly "susceptible of two different constructions, so "that reasonably intelligent men on reading "the contract would honestly differ as to the "meaning thereof, that construction will be "adopted which is most favorable to the in- "sured."

The New York statute should not be construed more loosely than a contract of insurance for it was a part of the contract. Besides it is a canon of interpretation, that the legislative purpose and the object aimed at are to be borne in mind, and that language susceptible of more than one construction is to receive that which will bring it in harmony with such object and purpose rather than that which will tend to defeat it.

> 23 Am. & Eng. Enc. of L., 319 (1893 Ed.) & cas. cited.

Our construction harmonizes with the purpose of the law.

III.

THERE ARE NO SERIOUS OBSTACLES IN THE WAY OF ENFORCEMENT OF THE PROVISIONS OF THE STATUTE AS WE UNDERSTAND THEM.

1. It is claimed by counsel for defendant in error, that the statute applies only to premiums and portions of premiums, and was not intended to apply to promissory notes. True, the statute does not apply to promissory notes, but does to premiums, and instalments and portions of premiums which the promissory notes happen to represent. If it did not, insurance companies could evade its provisions entirely by taking promissory notes from their policy holders to evidence all premiums.

2. There can be no trouble about the place where and person to whom to pay the premium for which a note has been given, nor would the note and the premium which it evidences be payable at different times and places and to different persons, for the terms of the note are a modification of the provisions of the policy in those respects.

3. Our opposing counsel has stated that the effect of the statute is to make the premium payable not less than thirty days after notice; hence, if applicable to notes given for premiums, the maturty of such notes (perhaps negotiable and payable at different times) might be dependent on the

subsequent acts of the parties. Counsel is mistaken, for the provisions of the statute in no way affect the time of payment, but only the right to declare a forfeiture for failure to pay at the time agreed upon.

4. The insured holds possession of his policy, but not of his note given for a premium; so that he is in a better position to be informed as to the amount, time, place, etc., in case of a premium for which he has not given a note.

5. It has been sought to raise an essential distinction between a premium and the indebtedness upon a note given for a premium. Premium in insurance means, the consideration paid or to be paid an insurer for the risk he undertakes by the contract of insurance. See Bouvier (Rawle's Revision); May on Insurance. The indebtedness upon a note given for a premium, or an instalment or portion of a premium answer the definition precisely. The statute does not apply to the note as such, but to the premium which the note evidences.

6. Defendant in error has contended by its counsel, that, since it gave the notice prescribed by the statute prior to the due date of the whole premium, it ought not to be required to again give the notice as to portions of the same premium. When it extended the time for payment of an instalment or portion of the premium it waived the effect of the notice. Justice Canty, of the Supreme Court of

Minnesota, in his dissenting opinion in this case, stated:

> "Surely, extending the time of payment of "the instalment of premium after giving the "statutory notice will waive the notice, and "The effect will be the same as if the notice had "never been given. Then the fact that notice "was given in this case before the time of pay- "ment was extended is wholly immaterial." (See Printed Record, folio 103.)

7. Opposing counsel in his brief in the lower court stated:

> "The statute requires the notice to be mailed "at least fifteen days prior to the day the pre- "mium is payable. Suppose a note were given "for a portion of a premium and were made "payable ten days from its date. How could "a statutory notice of its maturity be legally "given?"

To this we might retort, suppose the company give me a policy, in which the first premium, for instance, is payable in ten days; how could a statutory notice of its maturity be given legally? It is within the power of insurance companies to avoid such difficulties.

Justice Canty (printed record, fol. 104) stated in this regard:

> "Suppose a law to prevent the forfeiture of "mortgaged chattels on the due day provided "that a chattel mortgage should be foreclosed "by giving fifteen days' notice, to expire on "the day the mortgage debt fell due. Could "it be held that the law did not apply merely "because there was only ten days from the "time of the execution of the mortgage to the "day the debt fell due? Again, could such a

"law be evaded by extending the time of pay-
"ment?"

8. It has been contended, that the note of Sept. 16, 1896, was accepted as a conditional payment of the premium, which was treated as though paid pending the maturity of the note; and that when the insured failed to pay the note the policy lapsed by reason of the operation of the condition in the note and the provisions of the policy itself, and lapsed as of Sept. 16th, 1896; therefore no notice prior to the due day of the portion of the premium evidenced by the note.

It is beyond dispute that the time for payment of a portion of the premium was extended, and that the policy continued in full force, to May 16th, 1897. Hence, simultaneously to hold that the policy lapsed Sept. 16th, 1896, is to hold it both in force and not in force between those dates, which is absurd. Courts sometimes declare certain pretended rights and relations void ab initio, but only in those cases where, for some reason, the pretended rights or relations never existed as a matter of fact. Here the contract was certainly in force up to, if not ever since, May 16th, 1897; hence this is not a case where a forfeiture ab initio could occur.

No scheme to evade the statute will be permitted to succeed.

Society v. McDougall, 19 N. Y. Supl. 481.

In that case the Court stated:

"that no scheme, however ingenious, can be
"devised by any insurance agent, which courts

"can permit to be successful in evading the "provisions of this most reasonable statute."

Unless the provisions of the statute are held applicable to premiums, and instalments and portions of premiums, evidenced by the notes of the insured, those provisions can be evaded, and will be evaded, in the great majority of life insurance contracts.

C. Our conclusion is that the lower Court did not give to the New York statute "full faith and credit," and erred in not sustaining plaintiff's claim of immunity from forfeiture of the policy of her late husband, which, by virtue of the Constitution of the United States, she was entitled to under a public act of the State of New York.

Respectfully submitted,

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